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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO, INC.,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

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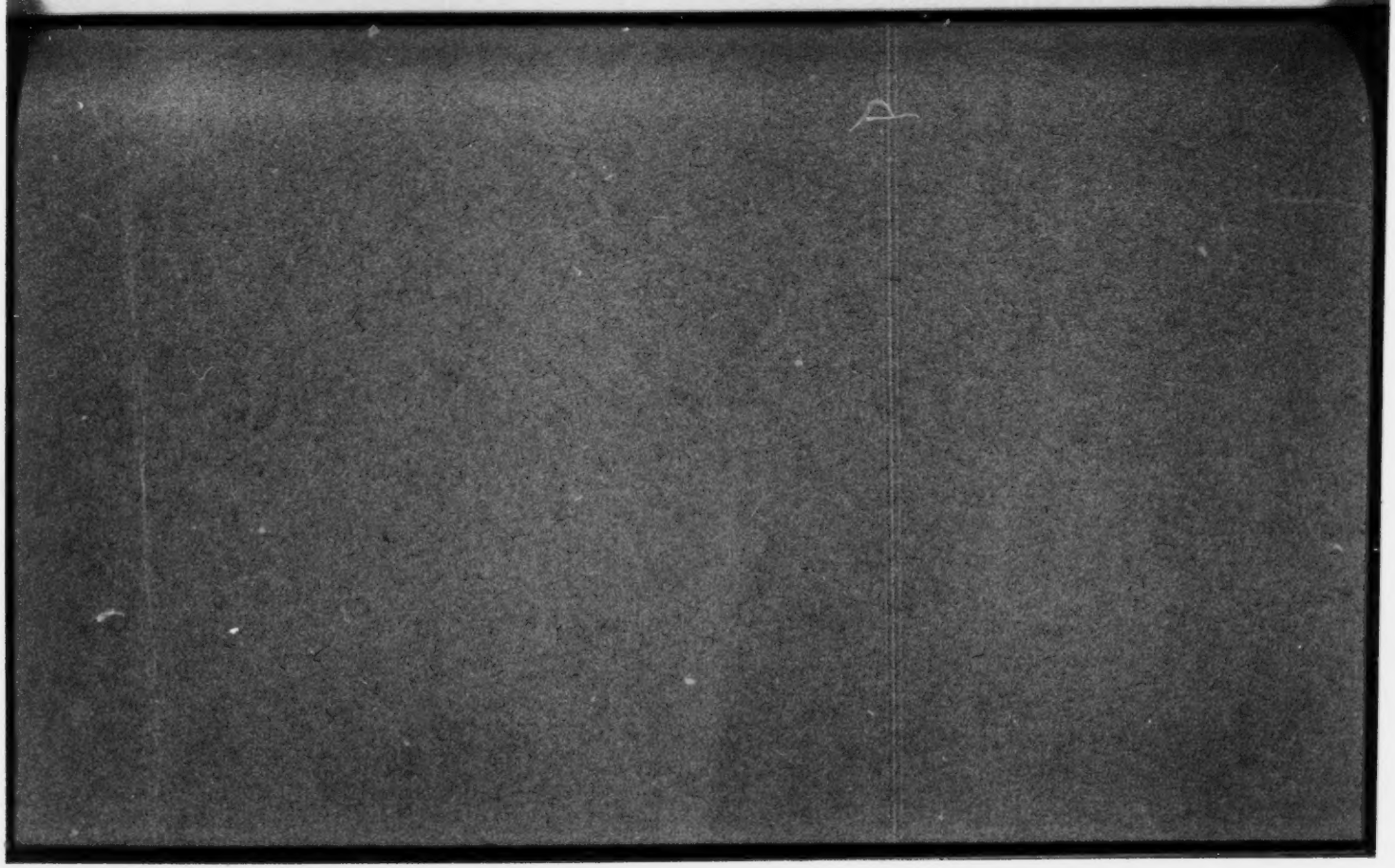

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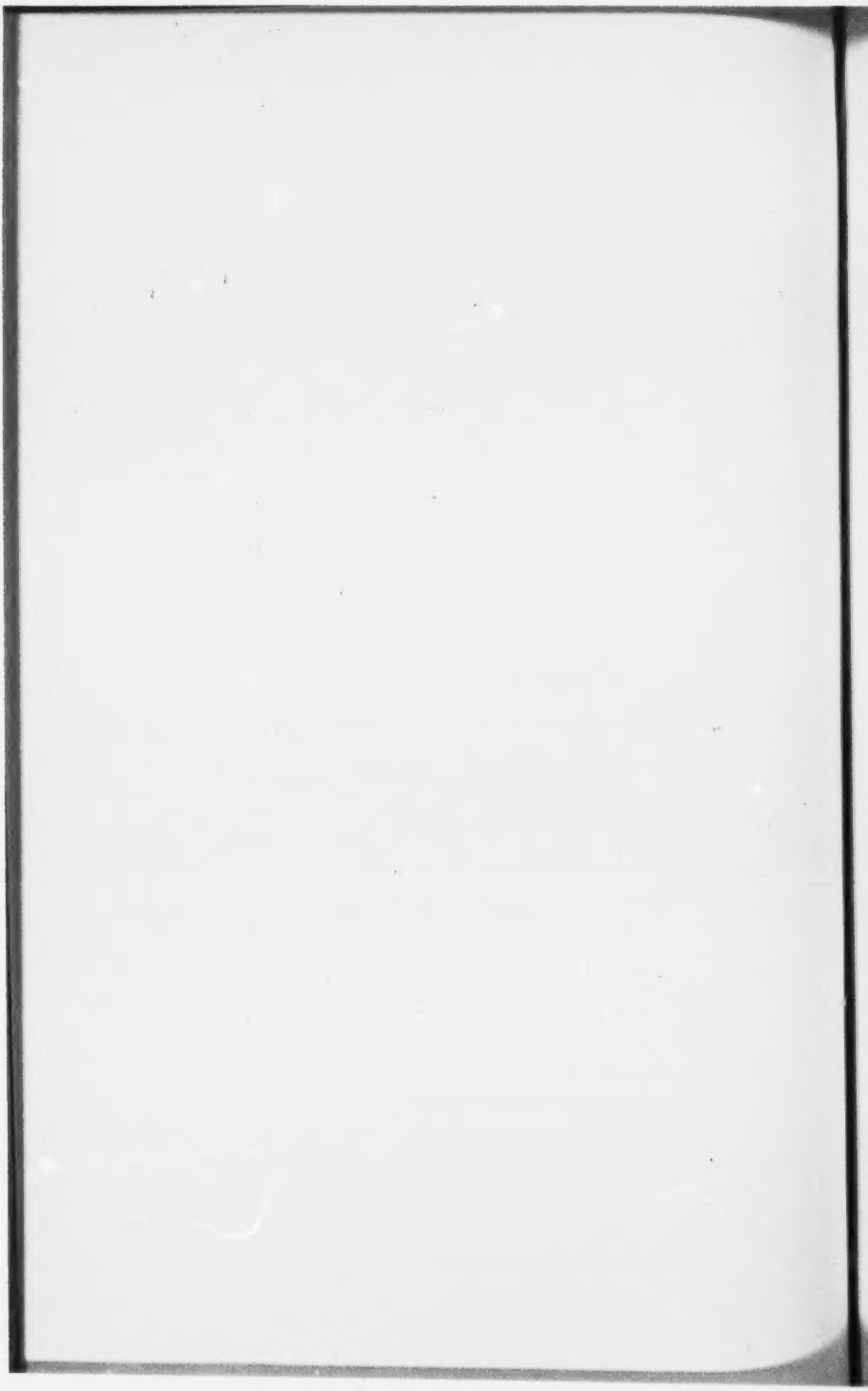

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It is the purpose herein to reply briefly to a few points raised in the brief of Respondent.

In the Respondent's opening statement, page 2, it contends that really no federal question is involved, for the reason that this cause was filed in the United States District Court solely because of diversity of citizenship. Granted that such was the ground for the cause being field in the Federal Court, this does not preclude the federal questions now involved.

The Respondent admits (pages 4 & 5) that there was very little dispute as to the quantity of materials used and work done under the seven contracts, but states, on page 7, that the claims of the Petitioner relate to "extra" work and materials, not to "additional" work and materials, and further, that such fact is well established by the evidence, citing, on page 20, as the establishment of this fact pages 3428 to 3431 of the record. Inspection of this reference discloses that the City Engineer, who prepared the final estimates, stated on direct examination that all of the claims of the Petitioner were for "extra" work under his interpretation of the contract.

The primary and main point at issue in this cause is for the recovery of additional work done and additional material furnished by the Petitioner upon the order of the Respondent, and that such additional work was contemplated and provided for by the express terms of the contract. Paragraph 9 of the contract (R. 4134) provides for the furnishing of excess or additional work and materials, and provides for the payment therefor as follows:

> "Quantities of work or materials in excess of those named in the instructions to bidders and of the same kind, are not to be considered as extra work, and such excess, when ordered by the Engineer, will be paid for at contract rates, as hereinbefore specified."

An examination of the opinion of the Circuit Court of Appeals (R. 4738 to 4748) shows that it cited Section 54 of the charter of the City of Miami, together with paragraphs 4, 5, 6, 7, 9 and 13 of the contracts. The opinion then states that "the contracts were not subject to change, contra-

diction, or variation by parol evidence." Of the twelve claims involved, only two were in any way dependent on parol evidence, nor was any change, contradiction, or variation of the contracts as written, involved. Reference is made to paragraph 7, page 16, of Petitioner's brief, where it is shown that Section 54 of the charter of the City of Miami does not in any way affect or have any bearing upon the points at issue in the instant case.

The Circuit Court of Appeals, in the instant case, stated that:

> "The Construction Company seeks to escape the terms of the written contracts by alleging that its claims are for additional work; that the work was done and the materials furnished and was accepted by the City; and that the City waived the conditions of the contracts. * * * the alleged changes were not authorized in writing as provided by the contracts, and it is not shown that the City Manager or the Commission ever knew that the alleged additional work was done and materials furnished. Under the facts shown there was no waiver of the requirements of the contracts." (R. 4742)

The Circuit Court of Appeals gave no reason or explanation to support its criticism of the Petitioner, that it sought to escape the terms of the written contracts by alleging that its claims were for additional work. Said Court apparently proceeded on the basis that there were no provisions in the contracts for the performance of additional work, notwithstanding it had cited paragraph 9 of the contracts, which expressly provides for excess work. There is, of course, no difference between "work or materials in excess of those named in the instructions

to bidders and of the same kind" and "additional work and materials." The phrase "additional work and materials" was obviously used by the Petitioner as a short expression for "work or materials in excess of those named in the instructions to bidders and of the same kind."

Said Court further stated, in its opinion as quoted above, that:

> "The alleged changes were not authorized in writing as provided by the contracts, and it is not shown that the City Manager or the Commission ever knew that the alleged work was done and material furnished."

The contracts did not provide that quantities of work or materials in excess of those named in the instructions to bidders, and of the same kind, which in reality is additional work, must be ordered in writing, or that the Respondent would order such excess or additional work in writing.

Some of the Petitioner's claims, such as claims for additional depth of inlets (R. 524) and catch basins (R. 554), did not depend upon any changes in the plans or specifications to support them, it being provided in paragraph 8 of the specifications for inlets and catch basins (R. 4184) that such structures should be built as shown on the plans or "as the Engineer (meaning the City Engineer) may direct." The claims of the Petitioner for additional depth of sewer pipe (R. 615), where the specifications, under paragraph 4 of the sewer specifications (R. 4182), provide that "excavation will be any depth authorized by the Engineer," did not involve any change in the plans or

specifications; hence, the provision in the contract, providing that changes in the plans and specifications would be given in writing, had no application to such claims. Again, the claims of the Petitioner for grading the area occupied by the curb and gutter, are provided for in the specifications for concrete curb and gutter (Par. 5, R. 4177); hence, it cannot be logically contended that a written order was required under the provision in the contracts that where changes in the plans and specifications were ordered, the Respondent would give such order in writing. The statement of the Circuit Court of Appeals that "it is not shown that the City Manager or the City Commission ever knew that the alleged additional work was done and materials furnished" has no application to the above classes of claims, because no change in the plans and specifications was involved. The claims originated, not by any change of plans or specificaitons, but from the orders of the City Engineer directing the excess or additional work under specific provisions of the specifications.

The opinion of the Circuit Court of Appeals also states:

> "It is further without dispute that as the work progressed under the seven contracts the Engineer made monthly estimates of work done and materials furnished, and the Construction Company was paid ninety per cent of his estimates. For more than six months the Construction Company each month received this ninety per cent payment for work done, materials furnished, and extra work. Its officers in charge of the projects made no complaint, submitted no claim, and disputed no estimate until more than three months after the work had been completed, and after the final report had been published by the engineer. It then came forward and made large ad-

> ditional claims. Under the theory now presented, the contractor held back each month claims in excess of $50,000.00 and accepted ninety per cent of the money on estimates of the engineer for work, materials, and extras, and this in the very teeth of the contracts which provide that claims be made known on or before the 25th day of each month—the engineer's estimate day. The conduct by the Construction Company does not add up to open and fair dealing."

The above, quoted from the opinion, is merely to show the inconsistency of the opinion with the evidence, for on page 16 of Petitioner's brief will be found 19 separate references to the record, showing that requests were made for the payment of additional work in the partial estimates at the very beginning of the construction, and that Respondent admits some of such requests.

Following the quotation last above mentioned, the Court proceeds to hold that "under the unambiguous terms of the contract, the City was entitled to a judgment as a matter of law on the disputed claims." In the face of inconsistency between statements in the opinion and the undisputed evidence, together with statements not supported by the evidence, and in the absence of any particular application of any interpretation of paragraph 7 or paragraph 9 of the contract, and the classification of all the claims as "extra" work, it would seem that this inconsistency with the evidence, and this erroneous omission, together with its consequent erroneous conclusion, based upon the theory that extra work only was involved, leaves the concluding finding "that the City was entitled to a judgment as a matter of law" without foundation.

POINT A

The Respondent argued that a complete answer to the Petitioner's argument in support of its Point A (which is that the decision of the Circuit Court of Appeals, by holding that the trial court's refusal to interpret to the jury the unambiguous provisions of the contracts sued on was harmless error, departed from the accepted and usual course of judicial proceedings) is that the Circuit Court of Appeals performed the duty which it found the District Court had not fully performed when it held that, under the unambiguous terms of the contracts, the City was entitled to judgment on the disputed claims as a matter of law.

The Respondent argued, in other words, that because the Circuit Court of Appeals held that the Respondent was entitled, as a matter of law, to judgment on the disputed claims under the unambiguous terms of the contracts, such precludes Point A, whether such holding of the Circuit Court of Appeals is a departure from the accepted and usual course of judicial proceedings or not. The infirmity of Respondent's argument in this respect is obvious. The Respondent's argument is based upon an assumption that such holding of the Circuit Court of Appeals was not a departure from the accepted and usual course of judicial proceedings.

POINT B

The Respondent argued, with respect to Point B, contained in Petitioners brief, that the case of *Gammino vs. Town of Dedham*, 164 F. 593, decided by the Circuit Court of Appeals for the First Circuit, is not in conflict with

the decision of the Circuit Court of Appeals in the instant case, because the facts and contract involved in the *Gammino case* were different from the facts and contracts in the instant case.

It is very seldom, in the field of adjudicated cases, that one finds a case where the facts are exactly like the case he is working on; but the question is not whether the facts are exactly the same, but whether they are substantially the same, and whether the principle applied is applicable to the instant case.

The Petitioner contended, in its brief, that the decision of the Circuit Court of Appeals, in the instant case holding that the final estimates of the Respondent were final and conclusive, is in conflict with applicable local decisions, and in conflict with the Circuit Court of Appeals for the First Circuit on substantially the same matter.

The Respondent also argued that the statement of the Court, in the *Gammino case,* relied upon by the Petitioner as establishing a conflict between the decisions of two Circuit Courts of Appeals, was obviously dictum, a mere comment by the Court upon a provision in the contract providing that,

> "In case of any dispute arising, the engineer shall have the right to settle the same, and he shall have the right to determine and interpret the meaning of these specifications and contract to be made under them, and all decisions of the engineer shall be final."

It is obvious that the Petitioner did not rely upon a "mere comment" to establish a conflict between the decisions of the Circuit Courts of Appeals for the Fifth and

First Circuits, as will be seen from an examination of the *Gammino case,* supra.

The Respondent further argued that there is nothing in the opinion of the Court in the *Gammino case* which would indicate that the charter of the Town of Dedham was at all comparable with the charter of the City of Miami, and we respectfully submit, as set forth on page 17 of Petitioner's brief, that said Section 54 of the charter of the City of Miami, even though quoted by the Circuit Court of Appeals in its decision, does not in any way bear upon nor affect the claims involved in the instant case.

The Respondent, in further argument on Point B, refers to the *Duval County v. Charleston Engineering & Construction Company case,* 101 Fla. 341, 134 So. 509, and cites from the decision of the Circuit Court of Appeals in the instant case as follows:

> "Decision of the engineer was binding upon the parties and where, as here, the contractor violated the terms of the contract and made no attempt to show that the Engineer, the City, or its agent, were guilty of bad faith, fraud, or deceit, it may not recover."

The Petitioner submits that the question of "bad faith, fraud or deceit" on the part of the Respondent has nothing to do with the claims of the Petitioner. Most of the Petitioner's claims depend on contract construction, and not on whether the City Engineer acted in bad or good faith when he prepared the final estimates. The City Engineer obviously proceeded to make his final estimates based upon his construction of the contracts, and not upon his

measurements of the amount of work done or materials furnished. The record is wholly devoid of any evidence, or contention on the part of the Respondent, that the Petitioner "violated the terms of the contract," as stated by the Circuit Court of Appeals.

The Petitioner, in its original brief herein, cited from the decision of the Supreme Court of Florida in *Duval County v. Charleston Engineering & Construction Co., supra,* in which the local court held that:

> "Final estimates may not be given conclusive effect as a final settlement of disputes arising under the contract, which disputes are legal in nature and depend upon construction of the terms of the contract * * * for settlement."

Which decision was predicated upon a provision in the contract to the effect that the County Engineer shall decide all questions and disputes which may arise as to the interpretation of the plans, character, quality, amount and value of any work, and his decisions shall be final and conclusive. It would appear that the Florida Court, in said case, followed the logic of the decision of the Circuit Court of Appeals of the First Circuit in *Gammino v. Town of Dedham, supra,* which decided, under a similar provision contained in a construction contract, that such provision

> "cannot be interpreted so as to deprive the parties of their right to a judicial construction of the contract."

POINT C

The Respondent attempts to meet the argument of the Petitioner on Point C (which is that the Circuit Court of Appeals, by affirming the action of the District Court in asking the jury, after it had deliberated and reported that it was "hopelessly tied up," how it was numerically divided, decided an important federal question in conflict with applicable decisions of the Supreme Court of the United States) by stating that *Brasfield v. United States*, 272 U.S. 448, 71 L.Ed. 345, and *St. Louis & S.F.R.Co. v. Bishard*, 147 F. 496, are not in point. The Circuit Court of Appeals of the Fifth Circuit, in the instant case, does not agree with the Respondent that such cases are not in point, but decided that the error was lost to the Petitioner because of its failure to object to the action of the trial court (R.4747). Our position is, as we tried to make it clear in our original brief, that no objection was necessary, because such action of the trial court affected its proper relations to the jury, and that no objection was necessary under the rule as it existed prior to the adoption of the new "Rules of Civil Procedure," and that no objection was necessary under the new "Rules of Civil Procedure." The Circuit Court of Appeals, in the instant case, it will be noted, held that under Rule 46 of said New Rules (which sought to abolish exceptions and liberalize objections) an objection was necessary predicate to putting "the trial court in error."

POINT D

The Respondent argued, in response to Point D (which is that the Circuit Court of Appeals, in holding that the Respondent was entitled to judgment as a matter of law

on the disputed claims under the unambiguous terms of the contracts, departed from the accepted and usual course of judicial proceedings), that the Petitioner, in its treatment of its Point A, asserted that unambiguous contractual provisions should have been, but were not, construed by the courts, and that now, in its Point D, it admits that such contractual provisions were in fact construed by the Circuit Court of Appeals. We think the Respondent missed the Petitioner's Point A. The Petitioner did not argue therein that the Circuit Court of Appeals did not undertake to pass upon contractual provisions, but its argument was that the Circuit Court of Appeals, by holding that the District Court's refusal to interpret to the jury the unambiguous provisions of the contracts sued on was harmless error, departed from the accepted and usual course of judicial proceedings. We submit that the Respondent's remaining argument, in reply to Point D, to the effect that the Petitioner's claims were for extra work and materials and not for additional work and materials, and that Petitioner has failed to give any consideration to Section 54 of the City charter and paragraphs 4, 5 and 13 of the contracts, has been fully answered in another part of this brief.

POINT E

The Respondent argued, with respect to Point E (which is that the decision of the Circuit Court of Appeals by affirming the action of the District Court, in withdrawing from the jury the claims of the petitioner for additional grading, departed from the accepted and usual course of judicial proceedings), that if the decision of the Circuit Court of Appeals, holding that under the unambiguous terms of the contracts the Respondent was entitled to

judgment as a matter of law on the dispuated claims, is sound, it follows that Petitioner's Point E is devoid of merit.

It may be assumed that if the District Court properly withdrew from the jury the claims of the Petitioner for excess or additional grading, the point falls; but the essential question is: Did the District Court properly withdraw such claims from the consideration of the jury? We undertook to show, in our original brief, that the Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings when it affirmed the action of the District Court in withdrawing such claims from the consideration of the Jury.

The Respondent also argued that inasmuch as the Petitioner refers to its claims as claims for "excess grading," that even the Petitioner recognizes that its claims relate to "extra work and material" and not to "additional work and material." This seems to us only a play upon words, a quibble. It is obvious that the words "excess" and "additional" were chosen by the Petitioner as interchangeable terms of short expressions for "work or material in excess of those named in the instructions to bidders and for the same kind." The essential nature of the claims determines their character.

Respondent refers to the reasons given by the District Judge in withdrawing claims for additional grading from the consideration of the jury, and submits that such action was legally sound and furnishes a reference (R.3988). Quoting from this reference (charge of the District Court):

> "Fully cognizant I am that the Plaintiff contends that there were errors in the blueprints, but I have

> regarded the plans and specifications together, and also the form of proposal, and how the bid was made; and I concluded that within reason the substantial variance by including a third dimension, was contradictory of the specifications and plans as a whole. Without that predicate there could be no recovery, by the plaintiff, on this claim; and for that predicate to be considered favorable to the plaintiff, the addition of the provision for the nine-inch depth would not have supplied any ommission,—would not have explained a doubt or obscurity in the specifications, reasonably interpreted, as a whole in connection with other provisions, but would have been directly contrary to the provisions of the contract, as I have explained."

It is true, and Petitioner agrees with the Court, that the provisions for the 9-inch depth would not have supplied any omission, would not have explained any doubt or obscurity, as the Court states, but what the Court fails to consider is that it would have corrected errors which Respondent admits existed in the profiles (R.3208). The contracts provide (R.4123):

> "If any errors or omissions are discovered in the plans, the same shall be brought to the attention of the Director of Public Service in order that the necessary explanation of corrections may be made before submitting the bid."

Not only does the Court ignore the "errors and corrections" provision of the contract, but concludes that a third dimension (depth) was contrary to the plans and specifications; yet, Respondent testified that the profiles were furnished for the purpose of providing this third dimension, the depth of excavation (R.3015). Action of the District Court was contrary to provisions of the con-

tract, on its own statement, and its reasoning in withdrawing such claims from the jury was contrary to the testimony of Respondent, which admitted that a third dimension (depth) was furnished with the original plans, but was grossly erroneous.

CONCLUDING STATEMENT

The Respondent, under its heading "Concluding Statement," page 24, quoted from the opinion of the Circuit Court of Appeals, which has already been treated, and references were furnished to show that evidence of the Respondent admitted that request was made for payment of some of these claims during the progress of the work; and this, together with the resolution of the City Commission, proposing to arbitrate the controversy in April of 1927, certainly upsets and proves there is no basis for the concluding statement of the quotation to the effect that "this conduct of the Construction Company does not add up to open and fair dealings."

Respectfully submitted, and dated this 17th day of August, 1942.

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